RECEIVED
11-13-2017
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP001745-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. COX,

Defendant-Appellant.

On Certification from the Court of Appeals, Reviewing a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable William W. Brash, III, Presiding, and an Order Denying Postconviction Relief, Entered in the Milwaukee County Circuit Court, the Honorable T. Christopher Dee, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

ISSUE PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

RELEVANT STATUTES 2

STATEMENT OF THE FACTS AND CASE 3

ARGUMENT 7

I. The Circuit Court Had the Authority to Waive the $250 DNA Surcharge. The Court's Oral Pronouncements Trump the Written Judgment and This Court Should Order that the Circuit Court Amend the Judgment to Vacate the $250 DNA Surcharge 7

A. The circuit court had authority to waive the $250 DNA Surcharge 9

i. The DNA Surcharge statute 9

ii. The Victim Witness Surcharge statute 10

iii. Fundamental rules of statutory construction demonstrate that the Legislature intended that circuit courts have the authority to waive the automatically-imposed DNA Surcharge 11

iv. The Legislature's decision to provide courts with the power to waive the DNA Surcharge is consistent with the broad discretion and authority generally afforded sentencing courts 13

v. The Court of Appeals' speculation about whether the Legislature would have wanted the possibility of such waiver in sex crime cases does not undermine the application of the rules of statutory construction 14

vi. This Court and the Court of Appeals' holdings concerning *ex post facto* challenges to the new DNA Surcharge statute neither control nor are controlled by whether a court has authority to waive the Surcharge 16

B. The circuit court's oral pronouncements at sentencing trump the written judgment of conviction 18

CONCLUSION 20

APPENDIX 100

CASES CITED

Bank of New York Mellon v. Carson,
2015 WI 15, 361 Wis. 2d 23,
859 N.W.2d 422 8

Drewniak v. State ex rel. Jacquest,
239 Wis. 475, 1 N.W. 899 (1942) 7

Kimberly-Clark Corp. v.
Public Service Com'n of Wisconsin,
110 Wis. 2d 455, 329 N.W.2d 143 (1983) 8

Peugh v. United States,
569 U.S. 530, 133 S.Ct. 2072 (2013) 17, 18

State ex rel. Kalal v. Circuit Ct. for Dane Cty.,
2004 WI 58, 271 Wis. 2d 633,
681 N.W.2d 110 ..... 7, 12, 14

State v. Cherry,
2008 WI App 80, 312 Wis. 2d 303,
752 N.W.2d 393 9

State v. Douglas,
2013 WI App 52, 347 Wis. 2d 407,
830 N.W.2d 126 ..... 7, 13

State v. Gallion,
2004 WI 42, 270 Wis. 2d 535,
678 N.W.2d 197 13

State v. Harbor,
2011 WI 28, 333 Wis. 2d 53,
797 N.W.2d 828 13

State v. Jorgensen,
2003 WI 105, 264 Wis. 2d 157,
667 N.W.2d 318 7

State v. Machner,
101 Wis. 2d 79, 303 N.W.2d 633 (1981) 7

State v. Maron,
214 Wis. 2d 384,
571 N.W.2d 454 (Ct. App. 1997) 7

State v. Peters,
2003 WI 88, 263 Wis. 2d 475,
665 N.W.2d 171 7

State v. Prihoda,
2000 WI 123, 239 Wis. 2d 244,
618 N.W.2d 857 19

State v. R.R.E.,
162 Wis. 2d 698, 470 N.W.2d 283 (1991) 8

State v. Radaj,
2015 WI App 50, 363 Wis. 2d 633,
866 N.W.2d 758 ..... 16, 17, 18

State v. Scruggs,
2017 WI 15, 373 Wis. 2d 312,
891 N.W.2d 786 ..... 16, 17

State v. Welkos,
14 Wis. 2d 186, 109 N.W.2d 889 (1961) 8, 12

State v. Williams,
2017 WI App 46, 377 Wis. 2d 247,
900 N.W.2d 310,
petition for review granted (Oct. 10, 2017) 6, 17

STATUTES CITED

973.045 ..... 2, 10, 11

973.045(1) 2, 10, 11

973.045 (2011-12) 11

973.046. ..... 2, 7, 11

973.046(1r) 2, 10

973.046(1g)(2011-12) 9, 15

973.046(1r)(2011-12) 9, 15

OTHER AUTHORITIES

<u>2013 Wisconsin Act 20, published July 1, 2013</u>

Section 2348 11

Section 2354 ..... 9, 11

Section 2355 ..... 9, 11

Section 9326 ..... 9, 11

Section 9426. ..... 9, 11

ISSUE PRESENTED

I. Did the circuit court have the authority to waive the $250 DNA Surcharge in this post-January 1, 2014, felony case?

At sentencing, the circuit court waived the $250 deoxyribonucleic acid (hereinafter "DNA") Surcharge. (24:36;App.125). Despite the court's oral pronouncements, the judgment of conviction reflects that Mr. Michael Cox must pay the Surcharge. The circuit court, a new judge now presiding, denied Mr. Cox's post-conviction motion to vacate the Surcharge, on grounds that it did not have authority to waive it. The Court of Appeals certified this question to this Court. (***State v. Cox***, No.16AP1745-CR, *Certification* by Wisconsin Court of Appeals)(Aug. 29, 2017)(App.101-106) (hereinafter "Certification").

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to accept review reflects that oral argument and publication are warranted.

RELEVANT STATUTES

973.045 Crime victim and witness assistance surcharge. (1) If a court imposes a sentence or places a person on probation, the court shall impose a crime victim and witness assistance surcharge. A surcharge imposed under this subsection may not be waived, reduced, or forgiven for any reason. The surcharge is the total amount calculated by adding up the amount for every misdemeanor count and every felony count as follows:

> (a) For each misdemeanor count on which a conviction occurred, $67.
>
> (b) For each felony count on which a conviction occurred, $92.

…….

973.046 Deoxyribonucleic acid analysis surcharge. (1r) If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows:

> (a) For each conviction for a felony, $250.
>
> (b) For each conviction for a misdemeanor, $200.

Wis. Stats. §§ 973.045(1) and 973.046(1r)(2015-16).[1]

[1] Mr. Cox has also provided the entirety of these two statutes in the Appendix. (App.134-135). Unless otherwise noted, all references to the Wisconsin statutes are to the 2015-16 version of the statutes.

STATEMENT OF THE FACTS AND CASE

The State charged Mr. Cox with one count of second degree recklessly endangering safety (Count 1) and one count of possession of tetrahydrocannabinols, second and subsequent offense (Count 2), after he was stopped for driving the wrong way on a highway. (1).

As support for the second and subsequent penalty enhancer on Count 2, the State attached to the complaint a certified judgment of conviction from Milwaukee Case Number 10-CF-4234, signed March 30, 2011, which stated that Mr. Cox was required in that case to "[p]rovide [a] DNA sample". (1:5).

Mr. Cox pled guilty to second degree recklessly endangering safety with the possession of tetrahydrocannabinols charge ordered dismissed and read-in. (23). He also pled guilty to a non-criminal first-offense operating while intoxicated in a related traffic matter. (23).

The sentencing occurred the same day.[2] The circuit court, the Honorable William W. Brash, III, presiding, sentenced Mr. Cox to prison. (24:33-34;App.122-123).

The court further ordered that—assuming that Mr. Cox had been previously ordered to provide a DNA sample—he would not be responsible for paying the DNA Surcharge in this case:

[2] The plea and sentencing hearings are set forth in two separate transcripts. (23;24).

> THE COURT: I'm assuming, Counsel, he's previously submitted a DNA sample?
>
> [DEFENSE COUNSEL]: I believe he has.
>
> THE COURT: All right. I'll order him to submit one if he hasn't previously done so. He doesn't have to repeat that process. And assuming for the sake of argument that he's already done that, *I'm going to waive the imposition of the DNA surcharge with regards to this matter*.

(24:36;App.125)(emphasis added).

Toward the end of sentencing, the court again declared its intention that Mr. Cox *not* be required to pay the DNA Surcharge. Defense counsel asked: "how much are court costs?" (24:37;App.126). The court responded: "The answer is I don't know because *when I take out the DNA surcharge*—was [sic] is the DNA surcharge currently? 250 minus. So whatever the balance of the court costs are." (24:37;App.126) (emphasis added).

The judgment of conviction, however, states that Mr. Cox is required to pay the $250 DNA Surcharge. (11;App.107-108).

Mr. Cox filed a post-conviction motion. (18). He noted that the judgment of conviction from an earlier case (10-CF-4234) attached to the complaint here demonstrated that he had been previously ordered to provide a DNA sample. (18:3). As such, he argued that the imposition of the DNA Surcharge was a clerical error in conflict with the circuit court's oral pronouncements at sentencing. (18). He also argued that that the court had authority to waive the Surcharge. (18).

The circuit court, the Honorable T. Christopher Dee now presiding, issued an order denying the post-conviction motion. (19;App.109-110). The court concluded that it "had

no authority under the statute to waive or vacate the surcharge on the basis that the defendant previously provided the DNA sample in another case." (19:1;App.109). The court further held that "[a]lthough Judge Brash apparently believed that he had the authority to waive the surcharge in this case, the fact remains that the defendant was sentenced for a felony offense committed after January 1, 2014, and therefore, the court was required by law to impose the surcharge." (19:2;App.110).

Mr. Cox appealed. He argued that circuit courts generally have broad authority at sentencing. (Cox COA Briefs). He further noted that in the same Act in which the Legislature implemented the new DNA Surcharge statute, it also added language to the nearby Crime Victim and Witness Assistance Surcharge (hereinafter "Victim Witness Surcharge") statute providing that the Victim Witness Surcharge could not be "waived, reduced, or forgiven for any reason". (Cox COA Briefs).

He argued that the presence of this language in the Victim Witness Surcharge statute, juxtaposed with absence of such language in the new DNA Surcharge statute, reflected that sentencing courts retain authority to waive the automatically-imposed DNA Surcharge. (Cox COA Briefs).

The Court of Appeals certified to this Court the issue of whether a circuit court has authority to waive a post-January 1, 2014, DNA Surcharge. In its Certification, the Court of Appeals noted that "the principles of statutory construction seemingly favor Cox's construction of the statute." (Certification at 4;App.104).

It also "recognize[d] that in a given case courts may choose to use that discretion to waive all or parts of DNA [S]urcharges to preserve a defendant's ability to meet other financial obligations such as restitution to the victim." (Certification at 4;App.104).

Nevertheless, the Court expressed two concerns with ruling in Mr. Cox's favor:

> (1) that recognizing that a court has authority to waive the automatically-imposed DNA Surcharge might "run afoul" of recent case law from both the Court of Appeals and this Court addressing challenges to the new DNA Surcharge statute as violations of a defendant's protections against *ex post facto* punishment;
>
> (2) that Mr. Cox's construction of the statute "would allow waiver of the DNA [S]urcharge for sex criminals, which [the Court] believes was not allowed under the previous version of the statute and which [the Court] doubt[s] the [L]egislature intended."

(Certification at 4-6;App.104-106).

The Court explained that because other DNA Surcharge cases were pending before this Court[3], and because it believed those decisions and published decisions of the Court of Appeals "may turn on the issue presented here," it requested certification . (Certification at 4-6;App.104-106).

This Court granted the Certification.

---

[3] At the time the Court of Appeals filed the Certification here, its certification in ***State v. Odom***, No. 15AP2525-CR was pending and a petition for review was pending in ***State v. Williams***, 2017 WI App 46, 377 Wis. 2d 247, 900 N.W.2d 310. *See* (Certification at 5;App.105). Since then, this Court has accepted review of both ***Odom*** and ***Williams***. *See* Wisconsin Supreme Court and Court of Appeals Access (WSCCA) records for ***Odom***, No. 15AP2525-CR (reflecting that the certification was granted on September 12, 2017); and ***Williams***, 2017 WI App 46, 377 Wis. 2d 247, 900 N.W.2d 310 (reflecting that the petitions for review were granted on October 10, 2017).

ARGUMENT

I. The Circuit Court Had the Authority to Waive the $250 DNA Surcharge. The Court's Oral Pronouncements Trump the Written Judgment and This Court Should Order that the Circuit Court Amend the Judgment to Vacate the $250 DNA Surcharge.

Principles of Law and Standards of Review

In general, circuit courts have broad discretion and authority at sentencing. *See, e.g.,* ***State v. Jorgensen***, 2003 WI 105, ¶¶ 12, 27, 264 Wis. 2d 157, 667 N.W.2d 318; ***State v. Douglas***, 2013 WI App 52, ¶ 20, 347 Wis. 2d 407, 830 N.W.2d 126. At the same time, the sentencing court's authority is controlled by statute. ***State v. Maron***, 214 Wis. 2d 384, 388, 571 N.W.2d 454 (Ct. App. 1997).

"[I]t is the legislative province to prescribe the punishment for a particular crime and the judicial province to impose that punishment." ***State v. Machner***, 101 Wis. 2d 79, 81, 303 N.W.2d 633 (1981). "Trial courts have broad discretionary power to deal with individual cases on their merits. These powers are as broad and inclusive as in the opinion of the [L]egislature was consistent with sound public policy." ***Id.*** at 81-82 (quoting ***Drewniak v. State ex rel. Jacquest***, 239 Wis. 475, 488, 1 N.W. 899 (1942)).

This case requires this Court to interpret Wisconsin Statute § 973.046, the DNA Surcharge statute. Statutory interpretation is a question of law subject to de novo review. ***State v. Peters***, 2003 WI 88, ¶ 13, 263 Wis. 2d 475, 665 N.W.2d 171.

Statutory interpretation begins with the plain language of the statute. ***State ex rel. Kalal v. Circuit Ct. for Dane Cty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

"Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole." ***Id.***, ¶ 46.

Statutory language is interpreted "in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** Further, statutory language is read "to give reasonable effect to every word, in order to avoid surplusage." ***Id.***

Another important rule of statutory construction is that "where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed." ***State v. Welkos***, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961); *see also* ***Kimberly-Clark Corp. v. Public Service Com'n of Wisconsin***, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983).

Though the use of the word "shall" is generally presumed to impose a mandatory requirement, "the [L]egislature's use of the word 'shall' is not governed by a per se rule." ***Bank of New York Mellon v. Carson***, 2015 WI 15, ¶ 22, 361 Wis. 2d 23, 859 N.W.2d 422.

Indeed, this Court has explained that the word "shall" "will be construed as directory if necessary to carry out the intent of the legislature." ***Id.*** (quoting ***State v. R.R.E.***, 162 Wis. 2d 698, 707, 470 N.W.2d 283 (1991)).

A. The circuit court had authority to waive the $250 DNA Surcharge.

i. The DNA Surcharge statute

Under the previous version of the DNA Surcharge statute, if a court imposed a sentence or placed a person on probation for a felony offense other than certain sex offenses, a sentencing court had to affirmatively exercise its discretion if it wished to impose a single $250 DNA Surcharge:

> **(1g)** Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court *may* impose a deoxyribonucleic acid analysis surcharge of $250.
>
> **(1r)** If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02(1) or (2), 948.025, 948.085, the court *shall* impose a deoxyribonucleic acid analysis surcharge of $250.

Wis. Stat. §§ 973.046(1g), (1r) (2011-12)(emphasis added). *See also* ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 303, 752 N.W.2d 393 (explaining that the imposition of a DNA Surcharge under the old DNA Surcharge statute for non sex-offenses required an affirmative exercise of a sentencing court's discretion and outlining factors for a court to consider in exercising that discretion).

Pursuant to 2013 Wisconsin Act 20, the Legislature created the current statute, which provides that a court "shall" impose a DNA Surcharge for each felony and misdemeanor conviction, effective January 1, 2014. 2013 Wis. Act 20, §§ 2354, 2355, 9326, 9426.

Thus, the DNA surcharge statute now provides:

> **(1r)** If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows:
>
> (a) For each conviction for a felony, $250.
>
> (b) For each conviction for a misdemeanor, $200.

Wis. Stat. § 973.046(1r)(App.134-135).

Therefore, under the new DNA Surcharge statute, a defendant will by default (without any affirmative exercise of discretion from the court) be assessed a DNA Surcharge for every conviction.

ii. The Victim Witness Surcharge statute

In close proximity to the DNA Surcharge statute is the Victim Witness Surcharge statute set forth in Wisconsin Statute § 973.045. (App.134-135).

The statutes are similarly structured in many ways: the Victim Witness Surcharge statute, like the DNA Surcharge statute, provides that "[i]f a court imposes a sentence or places a person on probation, the court *shall* impose" a Victim Witness Surcharge. Wis. Stat. § 973.045(1); (App.134-135) (emphasis added). The Victim Witness Surcharge statute, like the DNA Surcharge statute, provides that a specific amount be imposed for each felony conviction ($92) and for each misdemeanor conviction ($67). ***Id.***; (App.134-135).

But unlike the language of the DNA Surcharge statute, the Legislature chose to include the following language in the Victim Witness Surcharge statute: "A surcharge imposed

under this subsection may not be waived, reduced, or forgiven for any reason." *Compare* Wis. Stat. § 973.045(1) *with* Wis. Stat. § 973.046. (App.134-135).

The Legislature added this statutory language prohibiting a court from waiving the Victim Witness Surcharge as part of 2013 Wisconsin Act 20, published July 1, 2013. 2013 Wis. Act. 20, § 2348.

Prior to this act, the Victim Witness Surcharge statute provided that a sentencing court "shall impose" the Surcharges, but did not include language prohibiting waiver of the Surcharge. *Compare* Wis. Stat. § 973.045 (2011-12) *with* Wis. Stat. § 973.045 (2015-16)(App.134).

iii. Fundamental rules of statutory construction demonstrate that the Legislature intended that circuit courts have the authority to waive the automatically-imposed DNA Surcharge.

Importantly, the Legislature thus implemented the new DNA Surcharge statute in the same Act in which the Legislature added the language prohibiting a court from waiving the Victim Witness Surcharge. 2013 Wis. Act 20, §§ 2348, 2354, 2355, 9326, 9426.

The Legislature's decision in this single Act to include language prohibiting the waiver of the Victim Witness Surcharge and its decision to *not* include the same language in the DNA Surcharge statute—under multiple principles of statutory interpretation and construction—demonstrates that the Legislature intended for circuit courts to have the authority to waive the DNA Surcharge:

- The statutes are close in proximity and share similar structures; consideration of the DNA Surcharge statute in "[c]ontext" "in relation to the language of" this "surrounding" and "closely-related" statute reflects that the Legislature intended the DNA Surcharge statute and Victim Witness Surcharge statutes to function in similar ways. *See* ***Kalal***, 271 Wis. 2d 633, ¶ 46.

- However, the Legislature's decision—in the very same Act—to include a specific provision explaining that a court cannot waive the Victim Witness Surcharge, but to not include this language in the newly-revised DNA Surcharge statute, reflects the Legislature's "different intention"; specifically, that circuit courts cannot waive the Victim Witness Surcharge but can waive the DNA Surcharge. *See* ***Welkos***, 14 Wis. 2d at 192.

- Further, to hold that the Legislature intended the word "shall" to impose on circuit courts a mandatory requirement to both impose *and* never waive such Surcharges would render the Legislature's language prohibiting waiver of the Victim Witness Surcharge surplusage. *See* ***Kalal***, 271 Wis. 2d 633, ¶ 46.

Thus, the long-standing principles of statutory construction reflect that circuit courts do have authority to waive the DNA Surcharge under the new statute. The Court of Appeals appears to agree: "the principles of statutory construction seemingly favor Cox's construction of the statute". (Certification at 4;App.104).

iv. The Legislature's decision to provide courts with the power to waive the DNA Surcharge is consistent with the broad discretion and authority generally afforded sentencing courts.

The fact that the Legislature chose to specify which surcharge could *not* be waived—the Victim Witness Surcharge—reflects the Legislature's recognition of the broad authority circuit courts generally hold when imposing and modifying criminal sentences. *See* ***Douglas***, 347 Wis. 2d 407, ¶ 20; *see also* ***State v. Harbor***, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828 (discussing circuit courts' inherent authority to modify criminal sentences).

Indeed, circuit courts have perhaps no broader discretion and authority in criminal proceedings than at sentencing. Reviewing courts generally afford sentencing decisions a "strong presumption of reasonability." ***State v. Gallion***, 2004 WI 42, ¶ 18, 270 Wis. 2d 535, 678 N.W.2d 197 (quoted source omitted). As this Court recognized in ***Gallion***, circuit courts are "best suited to consider the relevant factors and demeanor of the convicted defendant." ***Id.*** (quoted source omitted).

Circuit courts are in the best position to assess what requirements upon the defendant are necessary and appropriate to achieve its sentencing objectives, taking into consideration of the protection of the public, gravity of the offense, and character of the defendant. *See* ***id.***, ¶ 44. (quoted source omitted).

As the Court of Appeals' Certification recognized, at times a sentencing court may determine that those objectives are not advanced by requiring a defendant to pay one or more DNA Surcharges and waive the Surcharge or Surcharges:

> Cox notes that generally, sentencing courts are accorded substantial discretion. We recognize that in a given case courts may choose to use that discretion to waive all or parts of DNA [S]urcharges to preserve a defendant's ability to meet other financial obligations such as restitution to the victim.

(Certification at 4;App.104).

v. The Court of Appeals' speculation about whether the Legislature would have wanted the possibility of such waiver in sex crime cases does not undermine the application of the rules of statutory construction.

In its Certification, the Court of Appeals recognized that the "principles of statutory construction seemingly favor Cox's construction of the statute" (Certification at 4; App.104).

The Court of Appeals' hesitation with regard to Mr. Cox's statutory construction arguments is that they would appear to "allow waiver of the DNA surcharge for sex criminals," which the Court "believe[s] was not allowed under the previous version of the statute and which we doubt the [L]egislature intended." (Certification at 4;App.104).

The Court of Appeals' concern that perhaps the Legislature did not wish to ever permit the waiver of the DNA Surcharge in sex-based offenses is speculative. That speculative concern does not trump the long-established rules of statutory construction. *See, e.g.* ***Kalal***, 271 Wis. 2d 633, ¶ 52 (explaining that statutory interpretation should focus on "textual, intrinsic sources of statutory meaning" and should not be "conclusory" or "result-oriented").

The pre-2014 version of the DNA Surcharge statute provided that a court "shall" impose a surcharge for listed sex-offenses; for all other offenses, it provided that a court "may" impose a DNA surcharge. Wis. Stat. §§ 973.046(1g), (1r) (2011-12). Thus, the old DNA surcharge statute treated certain sex-based offenses differently, imposing an automatically-imposed surcharge.

Mr. Cox is unaware of any case law directly addressing whether a court had any authority to waive the Surcharge in those sex-crimes cases under the old DNA Surcharge statute.

But even further, when revising the statute, the Legislature was of course aware of the statute it was revising. As such, if the Legislature wished to create a statute whereby courts lacked all authority to ever waive the DNA Surcharge in certain sex-offense cases, it could have done just that. It knew how to do that because that is exactly what it did when revising the Victim Witness Surcharge in the same Act. It did not do so.[4]

---

[4] Though this too is speculative, if the Court of Appeals is correct that the Legislature intended to prohibit waiver of the DNA Surcharge for the listed sex offenses under the old statute, it is possible that the Legislature may have determined that this was no longer necessary under the new statute given that the State would now be presumptively collecting a $250 surcharge on all felony counts and a $200 surcharge on all misdemeanor counts.

Mr. Cox does not suggest this to say that it is indeed the case; rather, it shows that the Legislature could have had reasons for such a change consistent with the language of the new DNA Surcharge statute when juxtaposed with the revised Victim Witness Surcharge statute. It also shows the danger of using speculation as opposed to application of the rules of statutory construction to discern legislative intent.

vi. This Court and the Court of Appeals' holdings concerning *ex post facto* challenges to the new DNA Surcharge statute neither control nor are controlled by whether a court has authority to waive the Surcharge

Whether a court has authority to waive something otherwise imposed by default (without an exercise of discretion) is a different question than whether a court must affirmatively exercise its discretion to impose it in the first place.

As such, the recent DNA Surcharge *ex post facto* case law—addressing whether the new DNA Surcharge statute violates *ex post facto* protections for persons who committed offenses before the start date of the new DNA Surcharge law but were not sentenced until after—does not address whether a court may waive the DNA Surcharge under the new statute.

The recent DNA Surcharge *ex post facto* decisions do refer to the old statute versus the new statute as "a change from a discretionary to a mandatory surcharge". *See, e.g.* ***State v. Scruggs***, 2017 WI 15, ¶ 38, 373 Wis. 2d 312, 891 N.W.2d 786; *see also* ***State v. Radaj***, 2015 WI App 50, ¶ 1, 363 Wis. 2d 633, 866 N.W.2d 758 (describing the old DNA Surcharge statute as authorizing a "discretionary" surcharge and the new statute as imposing a "mandatory" surcharge).

But that terminology reflects the shift at issue in the *ex post facto* analysis: from *no* surcharge unless the court affirmatively exercised its discretion in a particular fashion to authorize the imposition of a *single* surcharge, to a default surcharge on *every* conviction in all criminal cases with no required exercise of discretion. *See, e.g* ***Scruggs***, 373 Wis. 2d

312, ¶ 2; ***Radaj***, 363 Wis. 2d 633, ¶¶ 8-9; ***State v. Williams***, ¶¶ 22-24, 2017 WI App 46, 377 Wis. 2d 247, 900 N.W.2d 310, *petition for review granted* (Oct. 10, 2017).

Whether a court has authority to waive the now automatically-imposed surcharge was simply not at issue in those cases. As such, they do not govern the statutory-interpretation question of whether a court may waive the DNA Surcharge under the new statute.

Further, recognizing that the Legislature left circuit courts authority to waive this automatically-imposed surcharge does not undermine the *ex post facto* analyses of this recent body of law. As the United States Supreme Court has explained, the "fact that the sentencing authority exercises some measure of discretion" will "not defeat an *ex post facto* claim." ***Peugh v. United States***, 569 U.S. 530, 133 S.Ct. 2072, 2081 (2013). The touchstone of the inquiry is "whether a given change in the law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes." ***Id.*** at 2082 (quoted source omitted).

So, for example, in ***Peugh***, the Supreme Court found that the application of heightened advisory (but not mandatory) sentencing guidelines to the defendant violated his constitutional *ex post facto* protections. At the time of his offense, the federal sentencing guidelines recommended a range of thirty to thirty-seven months for the offense; at the time of his sentencing, the guidelines recommended seventy to eighty-seven months. ***Id.*** at 2075.

The Government argued that this change—and the application of the higher advisory guideline range—was not an *ex post facto* violation because the guidelines were only advisory, not binding on the sentencing court. ***Id.*** at 2085.

The Supreme Court rejected this outright, explaining that its precedent "firmly establish[es] that changes in law need not bind a sentencing authority in order to violate the *Ex Post Facto* Clause." ***Id.*** at 2086.

Thus, the fact that a sentencing court retains authority to waive a now automatically-imposed surcharge does not undermine the *ex post facto* problem recognized in cases such as ***Radaj*** because there is no requirement that a change in the law result in a 100 percent absolute increase in penalty for all defendants to violate *ex post facto* protections.

The DNA Surcharge statute changed from a default of no surcharge absent an affirmative and sufficient exercise of discretion to now an automatically-imposed surcharge on every single criminal conviction without the need for any exercise of discretion. Where courts have found that change to have a punitive effect (thereby implicating *ex post facto* protections), the now-automatically imposed surcharge on each count has indeed created a "sufficient risk of increasing the measure of punishment," *see* ***Peugh***, 133 S.Ct. at 2082, even though the court retains authority to waive it.

Simply put, this case—which involves no *ex post facto* challenge but instead presents a question of statutory interpretation—neither determines or is determined by the question of whether imposition of the new DNA Surcharge statute violates *ex post facto* protections.

B. The circuit court's oral pronouncements at sentencing trump the written judgment of conviction.

When a conflict exists between a court's oral pronouncement at sentencing and the judgment of conviction, "[t]he record of the circuit court's unambiguous oral

pronouncement of sentence trumps the written judgment of conviction". ***State v. Prihoda***, 2000 WI 123, ¶ 15, 239 Wis. 2d 244, 618 N.W.2d 857.

The circuit court's unambiguous oral pronouncements provided that, assuming that Mr. Cox had been previously ordered to provide a DNA *sample*, he would not be required to pay the $250 DNA Surcharge in this case. (24:36-37; App.125-126).

The certified judgment of conviction from Milwaukee County Case Number 10-CF-4234, attached to the complaint in this case, established that Mr. Cox had been previously ordered to provide a DNA sample. (1:5).

As the circuit court had the authority to waive the DNA surcharge, the circuit court's oral pronouncement trumps the error in the written judgment. This Court should therefore enter an order reversing the circuit court's denial of Mr. Cox's post-conviction motion and amending the judgment of conviction to vacate the $250 DNA Surcharge.

CONCLUSION

For these reasons, Mr. Cox respectfully requests that this Court enter an order reversing the circuit court's decision denying his motion for postconviction relief and remanding this matter to the circuit court with an order to amend the judgment of conviction to vacate the $250 DNA surcharge.

Dated this 13th day of November, 2017.

Respectfully submitted,

_____

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,193 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of November, 2017.

Signed:

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of November, 2017.

Signed:

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

Court of Appeals' Certification 101-106

Judgment of Conviction, filed 7/23/15 (11) 107-108

Decision and Order Denying Motion for
Postconviction Relief, filed 8/8/16 (19) 109-110

Imposition of Sentence (Excerpt of 7/22/15
Sentencing Transcript)(24:22-44) 111-133

Wisconsin Statutes §§ 973.045 and 973.046
(2015-16) 134-135